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GERALD ARMSTRONG

**FILED**

NOV 17 1995

HOWARD HANSON  
MARIN COUNTY CLERK

By J. NAUE Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF MARIN

**RECEIVED**

NOV 17 1995

**HUB LAW OFFICES**

CHURCH OF SCIENTOLOGY INTERNATIONAL,) )  
a California not-for-profit religious corporation, ) )

Plaintiff, ) )

vs. ) )

GERALD ARMSTRONG; MICHAEL WALTON; ) )  
THE GERALD ARMSTRONG CORPORATION, ) )  
a California for-profit ) )  
corporation; DOES 1 through 100, ) )  
inclusive, ) )

Defendants. ) )

No. 157 680

REQUEST FOR JUDICIAL NOTICE  
IN OPPOSITION TO MOTION FOR  
SUMMARY ADJUDICATION ON  
FIRST CAUSE OF ACTION OF  
ARMSTRONG'S FIRST AMENDED  
CROSS-COMPLAINT

Date: 12/1/95  
Time: 9:00 a.m.  
Dept: One

Defendant and Cross-Complainant Gerald Armstrong requests that this Court take judicial notice of the following records of certain United States District Courts:

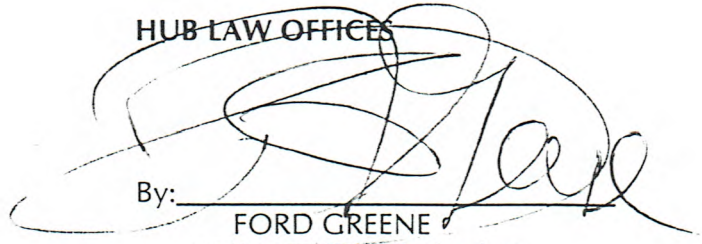
A. Memorandum Opinion, United States District Court Senior Judge John L. Kane Jr. in *Religious Technology Center v. F.A.C.T.NET, INC.*; Lawrence Wollersheim and Robert Penny, United States District Court for the District of Colorado, Case No. 95-K-2143, filed October 3, 1995.

B. Opinion and Order in *Church of Scientology International v. Time Warner, Inc.*; *Time Inc. Magazine Company*, and *Richard Behar*, the United States District Court, Southern District of New York, Case No. 92 Civ. 30324 (PKL) November 14, 1995.

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DATED: November 17, 1995

HUB LAW OFFICES



By:

FORD GREENE  
Attorney for Defendant  
GERALD ARMSTRONG



**PROOF OF SERVICE**

I am employed in the County of Marin, State of California. I am over the age of eighteen years and am not a party to the above entitled action. My business address is 711 Sir Francis Drake Boulevard, San Anselmo, California. I served the following documents:

REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION ON FIRST CAUSE OF ACTION OF ARMSTRONG'S CROSS-COMPLAINT

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California:

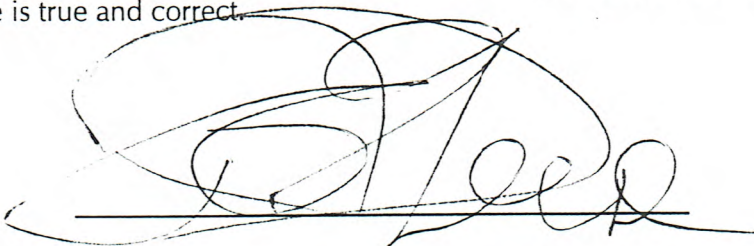
Andrew Wilson, Esquire  
WILSON, RYAN & CAMPILONGO  
235 Montgomery Street, Suite 450  
San Francisco, California 94104

LAURIE J. BARTILSON, ESQ.  
Bowles & Moxon  
6255 Sunset Boulevard  
Suite 2000  
Los Angeles, California 90028

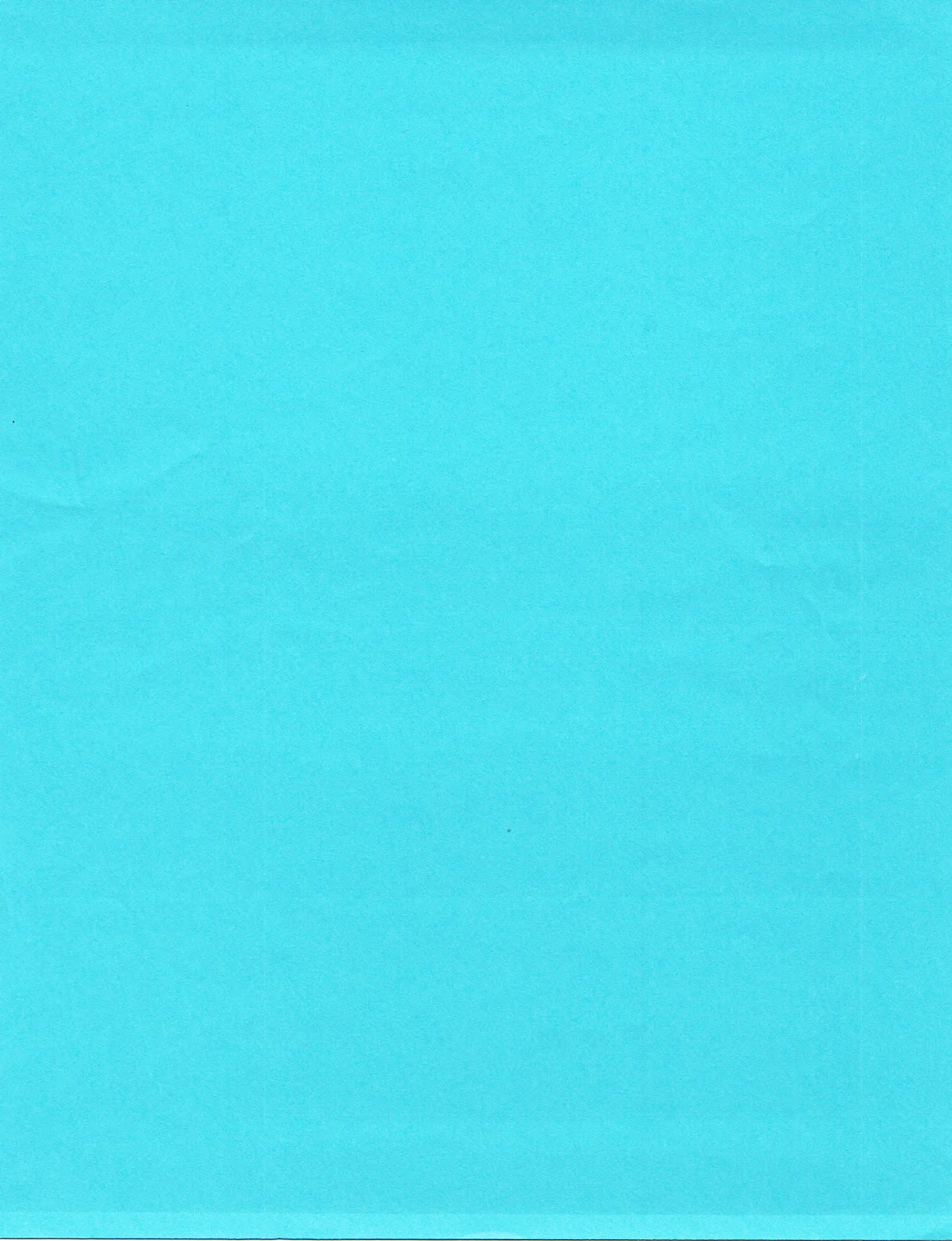
BY FAX

- (Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee.
- (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DATED: November 17, 1995









**PUBLISH** P. 2

UNITED STATES DISTRICT COURT  
DENVER, COLORADO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

SEP 15 1995

Civil Action No. 95-B-2143

JAMES R. MANSPEAKER  
CLERK

RELIGIOUS TECHNOLOGY CENTER, a California non-profit ~~corporation~~ <sup>BY</sup> ~~corporation~~

Plaintiff,

v.

F.A.C.T.NET, INC., a Colorado corporation: LAWRENCE WOLLERSHEIM,  
an individual; and ROBERT PENNY, an individual,

Defendant.

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MEMORANDUM OPINION AND ORDER

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KANE, J.

On August 21, 1995 Religious Technology Center ("RTC"), a California non-profit corporation, filed a verified complaint against Lawrence Wollersheim, Robert Penny and F.A.C.T.NET, Inc. ("FACTNET") for injunctive relief and damages for copyright infringement (17 U.S.C. § 501) and trade secrets misappropriation (Colo. Rev. Stat. § 7-74-102 to -110 (1986)).

Jurisdiction is based on 28 U.S.C. §§ 1331 and 1338(a) and (b) in that this is an action for copyright infringement under 17 U.S.C. § 501. Supplemental jurisdiction exists under 28 U.S.C. § 1367 over the trade secrets misappropriation claim, which RTC alleges arises out of the same transaction and occurrences.

Before me is RTC's motion for preliminary injunction.

I. Background.

RTC is one of the formal entities constituting the Church of Scientology (the "Church") founded by L. Ron Hubbard. FACTNET is a non-profit educational and charitable corporation registered and



with its principle place of business in Colorado. Wollersheim and Penny are former Scientologists.<sup>1</sup> Wollersheim serves as President of the Board and Executive Director of FACTNET and Penny is a member of the FACTNET Board.

Defendants, operating on minimal financial resources, maintain a library and archive information concerning, inter alia, an ongoing public controversy regarding the Church's status as a religious tax exempt organization and charges that its practices involve harmful psychological coercion which has resulted in mental and physical harm to a significant number of its adherents.

Much of the information maintained by Defendants is made available publicly on FACTNET's Bulletin Board Service on the international computer network known as the Internet.<sup>2</sup> Other data is stored in a private portion of the FACTNET library which includes information concerning and provided by former Scientologists and their families.

RTC alleges Defendants have placed on the Internet unauthorized copies of unpublished religious works called OT materials, often referred to as "Advanced Technology." They list

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<sup>1</sup> The Church of Scientology and Wollersheim have opposed each other in litigation in various cases. In Wollersheim v. Church of Scientology, 15 Cal. App. 4th 1476 (Cal. Ct. App. 1992), an action in which Wollersheim alleged intentional and negligent infliction of emotional injury, the court affirmed its prior judgment in his favor as to the cause of action for intentional infliction with the exception of the \$30 million damage award which it reduced to \$500,000 for compensatory damage and \$2 million for punitive damages. A final judgment which the evidence discloses remains unpaid.

<sup>2</sup> A bulletin board service ("BBS") usually requires users to dial in through telephone lines to access specialized information or services.



the materials in issue ("the Works") in Exhibit "A" to the complaint.

RTC maintains it has the exclusive license to the Works. It asserts the materials consist of unpublished works of L. Ron Hubbard, the founder of the Church of Scientology. The Church only permits access to each of the works to members who have attained the proper level of spiritual enlightenment and made the requisite financial contributions. Such access is through a highly controlled system known as "auditing" involving supervision by a senior member of the Church. RTC claims the Works are available at only seven sites around the world and are never removed from these locations.

Defendants maintain any of the Works in its possession were obtained lawfully and are maintained in the non-public section of Defendants' library. Wollersheim has provided consulting services to lawyers representing clients in litigation involving the Church but denied making copies of the Works for this purpose. Defendants assert they have not posted any of the Works to the Internet for public availability and that it is their policy not to do so.

According to Wollersheim, the only deviation from this policy was between August 1 and August 3, 1995, when, due to miscommunication, Arnold P. Lerma, a FACTNET director posted some of the Works to the Internet. The portions of the Works published by Lerma had been part of an unsealed public court record in the Central District of California in Church of Scientology



International v. Fishman, No. CV 91-6426 HLH (Tx) C.D. Cal.<sup>3</sup> These materials were attached to an affidavit filed by Fishman in that case. Wollersheim testified he received a copy of the affidavit from Fishman's counsel in the course of the consulting services Wollersheim provided in that case.

On August 15, 1995, Defendants posted a message to a newsgroup on the Internet claiming Lerma had acted on their behalf and with their endorsement and that they stood behind his actions.

## II. Procedural History.

On August 21, 1995, Judge Babcock, ruling on ex parte motions, granted a temporary restraining order against Defendants. His order restrained Defendants from the unauthorized copying, use or reproduction of the Works identified in Exhibit "A" to the complaint or any other part of the works that are part of the Advanced Technology, in particular the copying into "any computer data base, information service, storage facility, archives, or other computerized network or facility." The order further restrained the destruction or concealing by Defendants of such Works in their possession. It also required RTC to file a bond in

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<sup>3</sup> On August 11, 1995, RTC sued Lerma in the United States District Court for the Eastern District of Virginia for copyright infringement and trade secret misappropriation in Religious Technology Center v. Lerma, No. 95-1107-A. On August 11, 1995, RTC obtained a restraining order and order of seizure and impoundment against Lerma. On August 22, 1995, RTC amended its complaint in that case, adding the Washington Post and two of its reporters as defendants. On August 30, 1995, that court denied RTC's motion seeking to enjoin the Post defendants from copying, disclosing, using, displaying, or reproducing Advanced Technology materials which it had obtained from the same public court file.



the amount of \$10,000 with the court forthwith. Judge Babcock set a hearing for a preliminary injunction before me on August 25, 1995 due to his being unavailable on that date.

Judge Babcock ordered Defendants to deliver the infringing articles within their possession and control into the custody of RTC's counsel. In this regard, he issued a writ of seizure and ordered a portion of the court file sealed until execution of the writ of seizure. Judge Babcock also granted RTC's motion for expedited discovery, ordering the depositions of all three Defendants to take place on August 23, 1995.

On August 22, 1995, extensive materials, including computer equipment, computer software and voluminous documents were seized from Defendants' premises pursuant to the writ. They were placed in the custody of RTC's counsel who proceeded to search for allegedly infringing materials.

On August 23, 1995, Defendants filed motions for a protective order, for temporary stay of expedited discovery and to require immediate delivery of confidential, proprietary, and privileged documents belonging to Defendants to their counsel of record, Thomas B. Kelley. RTC filed an opposition to the motion for a stay.

On August 24, 1995 I ordered an extension of the time for taking the depositions of Defendants and an extension of the restraining order until September 8, 1995 when the preliminary injunction hearing commenced. On August 25, 1995 I ordered Defendant's counsel or his representative be allowed to be present



while Plaintiff's counsel searched the impounded evidence. I further ordered any items to which Defendants' might claim privilege to be segregated from the materials impounded and handed over to the court.

The preliminary injunction hearing took place before me on September 8, 11, and 12, 1995. At the termination thereof, I issued an oral ruling. I denied RTC's request for a preliminary injunction and ordered RTC to return and restore to the Defendants all seized materials. I ordered Defendants to maintain the status quo as to the possession of all copyrighted materials at issue in the case and restricted each of Defendants to making only fair use of the materials. I reserved the right to clarify my oral order by way of a written opinion. This is that opinion.

### III. Preliminary Injunction.

I have authority to issue a preliminary injunction under Federal Rule of Civil Procedure 65. In addition, the Copyright Act specifically authorizes me to grant a preliminary injunction "on such terms as [I] may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502. The Colorado Uniform Trade Secrets Act similarly grants me the power to grant injunctive relief "to prevent or restrain actual or threatened misappropriation of a trade secret."

A preliminary injunction is an extraordinary remedy providing the potential for considerable harm yet its emergency nature does not afford the court the usual degree of careful consideration afforded by the deliberative processes of a trial. As a



consequence, the issuance of such an injunction, like the power of contempt, is one which is at best used sparingly, if at all.

Moreover, the very purpose of an injunction is to preserve the status quo ante. That is a rather elegant piece of Latin which means the last existing state of peaceable, noncontested conditions which preceded the pending controversy. I will not dwell on this, but it is helpful to observe that our legal forefathers were not fools; the complete phrase is status quo ante bellum which literally means "the state of things before the war began."

Given this purpose and the caution the law prescribes there are four basic considerations or findings which must be made before an injunction can issue. These same four factors likewise assist in determining the scope of the injunction and the conditions which attach to it.

A party seeking injunctive relief must establish:

- (1) it will suffer irreparable injury unless the injunction issues;
- (2) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;
- (3) the injunction would not be adverse to the public interest; and
- (4) substantial likelihood that the movant will eventually prevail on the merits.

Walmer v. United States Dep't of Defense, 52 F.3d 851, 854 (10th Cir. 1995). The Tenth Circuit has adopted a modified interpretation of the fourth "likelihood of success" element. Id. "If the movant has satisfied the first three requirements for a preliminary injunction, the movant may establish likelihood of



success by showing questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberative investigation." Id. This modified test applies, however, only where the first three requirements are satisfied.

Similarly, the less rigorous test for injunctive relief sometimes employed in copyright cases is only applicable where the plaintiff has made a prima facie showing of infringement. See, e.g., Financial Control Assoc's v. Equity Builders, Inc., 799 F. Supp. 1103, 1113 (D. Kan. 1992); 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.06[A] (1995).

The circumstances of this case warrant consideration and balancing of all four factors.

A. Substantial Likelihood of Success on the Merits.

1. Copyright Infringement Claim.

RTC contends it will succeed on the merits of its claims for copyright infringement because it owns a valid copyright and the copyrighted work was copied by Defendants without its authorization.

To prevail in a copyright infringement action, a plaintiff must prove (1) ownership of a valid copyright and (2) defendant copied, "protected components of the copyrighted material." Gates Rubber Co. v. Bando Chemical Indus., Ltd., 9 F.3d 823, 831 (10th Cir. 1993). If a certificate of registration in accordance with 17 U.S.C. § 410(c) has been obtained, there is a presumption in favor of the plaintiff that a valid copyright exists. Id. at 832. The



defendant then has the burden of overcoming this presumption. Id.

RTC claims it has certificates of registration for the Works, is their exclusive licensee and is entitled to protect them as if it were the original holder of the copyrights. At the outset of the preliminary injunction hearing, Defendants' counsel stipulated only for the purposes of this proceeding that the Works were originated by L. Ron Hubbard and that RTC has a valid title to the copyright in the Works.

Once a plaintiff shows it holds a valid copyright, it must then prove the defendant unlawfully appropriated some protected portions of the copyrighted work at issue. Id. This question breaks down into two separate inquiries:

- 1) [W]hether the defendant, as a factual matter, copied portions of the plaintiff's [writings]; and
- 2) whether, as a mixed issue of fact and law, those elements of the [writings] that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.

Id. In Gates Rubber the court noted that the inquiry does not end with a finding that the defendant copied the plaintiff's materials. "Liability for copyright infringement will only attach where protected elements of a copyrighted work are copied." Id. at 833.

The Copyright Act provides:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b). The 1976 House Report noted copyright protection does not preclude others from using the ideas or



information revealed by the author's work, rather it refers only to the expression of the work adopted by the author. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57 (1976), reprinted in 17 U.S.C.A § 102 app. at 17 (1976)).

RTC asserts Defendants themselves and through others directly copied the copyrighted Works. It maintains Defendants duplicated portions of the Advanced Technology materials onto a newsgroup<sup>4</sup> on the Internet and onto a Web site,<sup>5</sup> making them accessible to Internet subscribers. These subscribers could then download the works onto their own computers and have personal copies.

RTC additionally claims Defendants provided Arnaldo Lerma with copies of the materials at issue. Lerma ultimately posted these copies onto the Internet. RTC claims the act of providing Lerma with the copies constitutes contributory copyright infringement.

The evidence showed, however, that, apart from the Lerma posting, the only copying of the Works by Defendants was scanning them onto their computer and placing them in the private section of their library without making them available to the public over the Internet or otherwise. Copying of this sort by Defendants falls within the well established limitation on the exclusive right of copyright ownership recognized in the Copyright Act, 17 U.S.C § 107.

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<sup>4</sup> A "newsgroup" is an electronic discussion group, serving as a bulletin board for users to post universally accessible messages, and to read and reply to those from others.

<sup>5</sup> World Wide Web is a network of computers on the Internet that maintains documents users can read and transfer with a number of programs.



Under this limitation, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C.A. § 107. The Copyright Act lists four factors for consideration in determining whether a particular use made of a work is fair use:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

"Fair use" is a factual determination. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549 (1985). Each fact must be assessed in light of the total circumstances of the case and then a conclusion can be made as to whether the doctrine applies.

In Harper & Row, a magazine editor obtained a copy of a copyrighted manuscript which he knew he was not authorized to publish. In an attempt to get a "scoop" on the magazine that had the rights to publish the piece, he published excerpts from it. The Court found for the copyright holders, determining on a factor by factor basis that there was no valid fair use on the part of the defendant. the Court held the questioned publication's effect on the market is the "single most important element of fair use." Id.



at 566.

Even if, as RTC maintains, the Works have not been published, the concerns of the Court in Harper & Row do not apply here. Defendants' use of the materials was not with the intention of depriving the planned publication of its full impact. Further, no evidence was presented as to the effect of the Defendants' copying of the Works upon the potential market for them.<sup>6</sup>

The evidence showed the Works are esoteric in nature and are delivered to certain followers by advanced Scientologists known as "auditors" as part of an elaborate system of instruction. The only financial harm RTC would suffer would be if followers were to forsake the Church's didactic methodology in favor of self instruction through the Works copied by Defendants. There was no suggestion, let alone evidence, of this potential for financial loss to the Church.<sup>7</sup>

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<sup>6</sup> This case is distinguishable from Bridge Publications, Inc. v. Vien, 827 F.Supp. 629 (S.D. Cal. 1993), appeal reinstated and transferred, 53 F.3d 344 (Fed. Cir. (Cal.) 1994).— The Vien court held there was a copyright infringement and fair use did not apply. In that case, as here, an affiliate of the Church sued to enjoin the use of copyrighted works. There, however, the defendants were charging for classes that used the documents as part of their study. Id. at 632. The court found defendants used the materials for the same purposes as the holders of the copyright. Id. at 635. The court also found that there was a wholesale copying of the work and that this weighed heavily against fair use. Id. at 636. Finally, the Vien court found that because the defendant's use of the materials was substantially similar to that of the Church, there was an economic harm as demand for sale or distribution from the Church would diminish. Id.

<sup>7</sup> An argument that RTC may be harmed financially by Defendants' intended criticism of the Works through copying would not prevail. In a similar case, the Second Circuit ruled that economic harm from criticism is not actionable under copyright



The alleged copying by the Defendants was not of a commercial nature. Rather, it was made for non-profit purposes to advance understanding of issues concerning the Church which are the subject of ongoing public controversy.

RTC has not introduced the Works in their entirety into evidence to enable comparison of the amount and substantiality of the portion of the Works copied with each copyrighted work as a whole. Notably, however, even if a work is introduced in its entirety, the copying may nevertheless constitute fair use. See, e.g., Sony Corp. v. Universal City Studios, 464 U.S. 417, reh'g denied, 465 U.S. 1112 (1984); Rotbart v. O'Dwyer Co., 34 U.S.P.Q. 2d 1085 (S.D.N.Y. 1985).

Defendants maintain and the evidence does not refute that the Lerma postings to the Internet were made in the context of ongoing dialogue in the particular newsgroup to which they were posted. they form part of the topical debate concerning whether the Works are of substance or are perpetuated as part of systemic mind control.

No evidence was introduced showing a likelihood that a follower of the Church would consider the postings by Lerma as a market substitute for the Works. Nor did the evidence show that the postings were of a commercial nature or had any effect on the potential market for the works. As such, the postings may well be considered as having been made for the purposes of criticism,

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laws. New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 160 (2nd Cir.), cert. denied, 498 U.S. 921 (1990).



comment or research falling within the fair use doctrine.

At this preliminary stage of proceedings, I find RTC has not shown a substantial likelihood of success on the merits of its copyright claim.

2. Misappropriation of Trade Secrets Claim.

RTC claims Defendants have misappropriated its trade secrets by acquiring, disclosing and using portions of the Works without authorization. Such claim is governed by the Colorado Uniform Trade Secrets Act and is not preempted by federal copyright statutes. See Gates Rubber, 9 F.3d at 846-47.

Colorado defines trade secrets as:

[T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession, which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Colo. Rev. Stat. § 7-74-102(4) (1986).

What constitutes a trade secret is a question of fact for the trial court. Gates Rubber, 9 F.3d at 848. Colorado courts apply a number of factors in determining whether a trade secret exists.

They include:

- 1) the extent to which the information is known outside the business;
- 2) the extent to which it is known to those inside the business, i.e., by the employees;
- 3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;



- 4) the savings effected and the value to the holder in having the information as against competitors;
- 5) the amount of effort or money expended in obtaining and developing the information; and
- 6) the amount of time and expense it would take for others to acquire and duplicate the information.

Colorado Supply Co., Inc. v. Stewart, 797 P.2d 1303, 1306 (Colo.App. 1990), cert. denied, Oct. 7, 1991.

Despite RTC and the Church's elaborate and ardent measures to maintain the secrecy of the Works; they have come into the public domain by numerous means. RTC's assertion that the only way in which the materials have escaped its control was through two thefts in Denmark and England was not supported by the evidence. A former senior Scientology official testified to ongoing difficulties the Church incurred in keeping the Works secret, including members losing materials in their possession. The evidence also showed portions of the Works have been made available on the Internet through persons other than Lerma, with the potential for downloading by countless users.

The Works posted by Lerma were publicly available as part of an unsealed public court record in the Central District of California in Church of Scientology International v. Fishman, No. CV 91-6426 HLH (Tx), C.D. Cal. Wollersheim testified copies of the Works in his possession were sent to him by an attorney representing defendants in that case for whom he had provided consulting services.

In August 1995, reporters of the Washington Post obtained copies of the Works from the unsealed Fishman file. The



newspaper's publication of portions of the materials prompted RTC to request injunctive relief in Religious Technology Center v. Lerma, Civil Action No. 95-1107-A (E.D. Va.). On August 30, 1995, that court found the materials had escaped into the public domain and onto the Internet and that Lerma was not their only source on the Internet. Id., slip op. at 14-15. (E.D. Va. Aug. 30, 1995). The court concluded RTC could not establish for the purpose of the preliminary injunction motion that the documents were "not generally known" as required by the Virginia statute.

In the course of the hearing before me, RTC changed its position with regard to what materials constitute the purported trade secrets. At the outset, RTC maintained the entire Works were trade secrets. After evidence was heard indicating that the Works were in the public domain, RTC claimed that only portions of the Works, rather than the whole were secret. RTC's ambivalence and admission as to the non-secret nature of certain portions of the Works casts some doubt casts on the secret status of Works as a whole.

The evidence showed the Works are widely known outside of the Church through multiple sources. As such, they are not secret within the meaning of the Colorado statute and RTC has not shown a substantial likelihood of success on the merits of its trade secrets claim.

B. Irreparable harm.

I do not find RTC will suffer irreparable harm if the broad injunction sought is not granted. There has been no showing that



RTC has lost nor will lose competitive advantage through Defendants' fair use of the Works, nor that such use has been for commercial purpose.

RTC claims use of the materials impedes its right to exercise its religious belief that the materials must be kept secret. I am not persuaded that a denial of the injunction sought will deprive followers of the Church of their freedom to exercise their religious beliefs. RTC effectively requests that I advance its religion at the expense of Defendants' lawful rights to use the materials for the purposes of criticism and research. The United States Constitution, common law and the Copyright Act preclude me from doing so.

C. Balancing of Hardships.

The evidence does not reflect that the threatened injury to RTC outweighs the damage the broad injunction sought may cause the Defendants. Such relief would effectively pull the plug on Defendants' electronic library, infringe not only on their rights of criticism and research but be the death knell of FACTNET. Any threatened injury to RTC is outweighed by this potentially devastating hardship to Defendants.

D. Public Interest.

Public interest lies with the free exchange of dialogue on matters of public concern. The injunction sought would silence the Defendants as participants in an ongoing debate involving matters of significant public controversy. Relief of this kind does not serve the public interest.



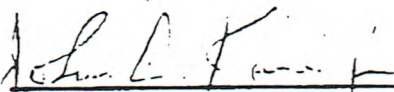
#### IV. Conclusion.

Having weighed all the relevant factors, I conclude RTC has not shown a substantial likelihood of success on the merits and the balance of harms weighs in favor of Defendants. Accordingly, IT IS ORDERED THAT Plaintiff's motion for preliminary injunction is DENIED;

IT IS FURTHER ORDERED THAT Plaintiff is to return and restore to Defendants immediately and at Plaintiff's expense all seized materials in the condition they were when taken and to the precise places from which they were taken;

IT IS FURTHER ORDERED THAT Defendants are to maintain the status quo as to their possession of all copyrighted materials at issue in this case and are restricted to making only fair use thereof. Defendants are prohibited from making any additional copies of the materials or transferring them in any manner or publicizing them other than in the context of fair use.

Dated this 15th day of September, 1995 at Denver, Colorado.

  
\_\_\_\_\_  
JOHN L. KANE, JR.  
U.S. SENIOR DISTRICT COURT JUDGE



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
JAMES R. MANSPEAKER, CLERK  
U.S. Courthouse  
1929 Stout Street, C-145  
Denver, CO 80294  
(303) 844-3433

Date: September 15, 1995

Case No. 95-B-2143

The undersigned hereby certifies that on the above date a true and correct copy of the preceding **MEMORANDUM OPINION AND ORDER** signed by Judge John L. Kane, Jr. on **September 15, 1995** was mailed to the following:

Todd P. Blakely, Esq.  
Robert R. Brunelli, Esq.  
1700 Lincoln St. Suite 3500  
Denver, CO 80203

Judge Lewis Babcock

Helena K. Kobrin  
7629 Fulton Avenue  
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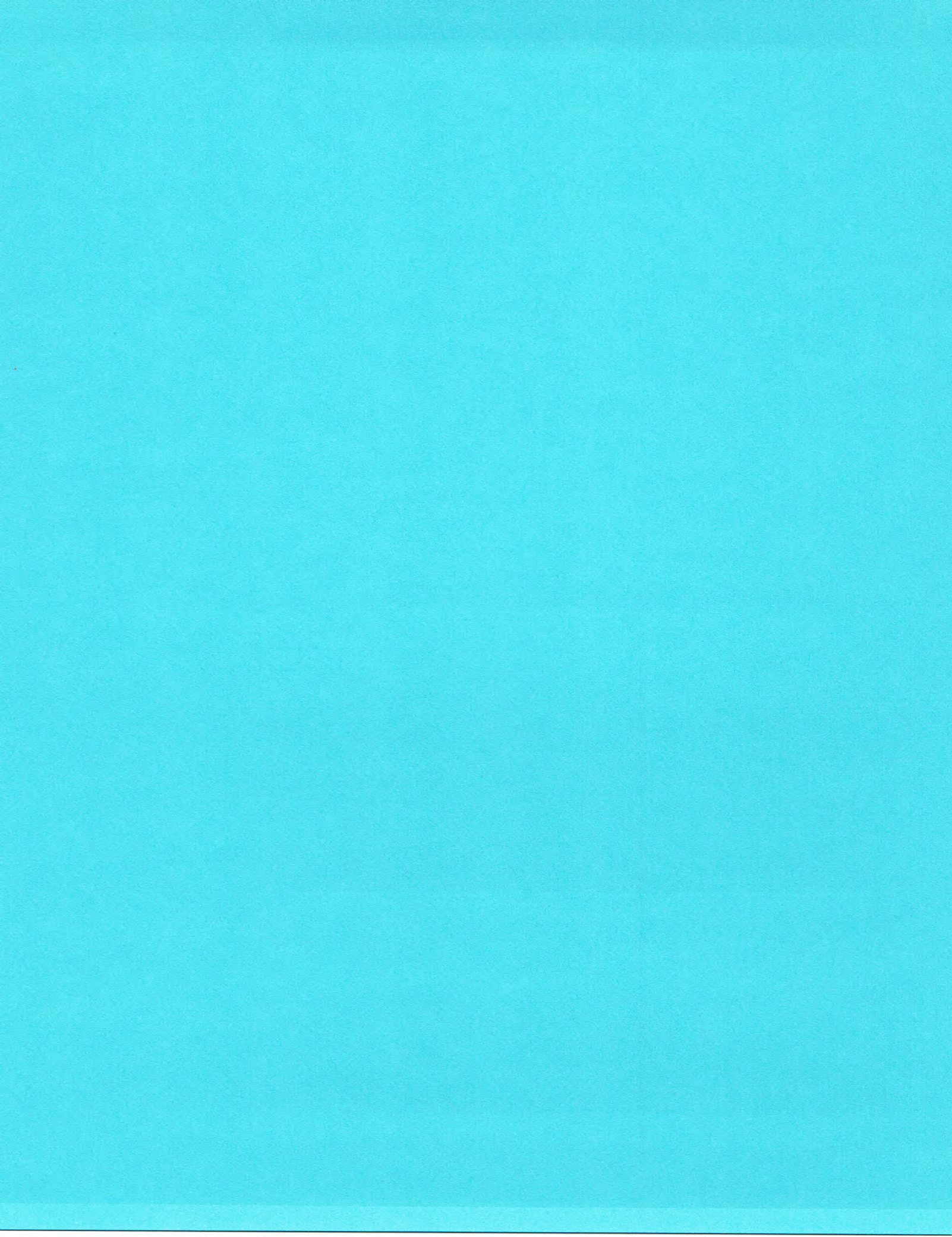
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Boston, MA 02110

JAMES R. MANSPEAKER, CLERK

By: *N. Hatcher*  
Deputy Clerk







UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CHURCH OF SCIENTOLOGY  
INTERNATIONAL,

Plaintiff,

- against -

TIME WARNER, INC., TIME INC.  
MAGAZINE COMPANY, and RICHARD  
BEHAR,

Defendants.

92 Civ. 3024 (PKL)

OPINION AND ORDER

**APPEARANCES**

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LEISURE, District Judge:

Plaintiff Church of Scientology International ("CSI") brought this action to recover for damages allegedly suffered from the publication of false and defamatory statements concerning CSI in the cover story of the May 6, 1991 issue of Time magazine. Defendants Time Warner, Inc., Time Inc. Magazine Company, and Richard Behar (collectively "Time") move this Court for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on the grounds that they lacked actual malice in publishing the article about CSI, an admitted public figure. See Plaintiff's Response to Defendants' First Set of Requests for Admission to Plaintiff. For the reasons stated below, defendants' motion is granted in part and denied in part.

#### DISCUSSION

"Summary judgment is proper only if, viewing all evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact" as to an essential element of a claim. Buttry v. General Signal Corp., No. 95-7135, 1995 WL 628556, at \*3 (2d Cir. Oct. 26, 1995). A public figure suing for libel must prove, as one of the essential elements of the claim, that the defendant published the material with actual malice, i.e., actual knowledge of its falsity or with serious subjective doubts as to its truth. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968). The First Amendment further requires that the



plaintiff prove actual malice with clear and convincing evidence. See id. Therefore, "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

Although a defendant's state of mind is at issue in a libel case covered by New York Times, that fact alone cannot preclude summary judgment, for First Amendment protection cannot be emasculated by unwillingness on the part of a court to grant summary judgment where "affirmative evidence of the defendant's state of mind" is lacking. A libel suit cannot be allowed to get to the jury, at enormous expense to the defendant, based on mere assertions of malice by the plaintiff. Cf. St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1318 (3d Cir. 1994) ("Summary judgment for the publisher is quite often appropriate because of the difficulty a public official has in showing 'actual malice.'"). Indeed, without judicious use of summary judgment to dispose of libel suits, "the threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 561, 549 N.E.2d 129, 135, 549 N.Y.S.2d 938, 944 (1989) (internal quotation marks omitted), vacated, 497 U.S. 1021 (1990), adhered to, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), cert. denied, 500 U.S. 954 (1991). Because the freedoms guaranteed by



"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Id. at 271 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)). Because sharp disagreement is essential to robust debate about important issues, "[a]ctual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." Mason v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). The speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected from libel attack by the First Amendment. Only where the speaker himself lacks this conviction, where the speaker entertains serious doubt as to the veracity of his statements, is the false statement actionable. See St. Amant, 390 U.S. at 731.

As a threshold matter, then, the court considers plaintiff's assertions that Behar, after publishing an article in Forbes critical of the church,

targeted the church with a fixed view of it as a 'destructive cult.' In the next five years, through the publication of his article in the May 6, 1991 issue of Time, Behar



the First Amendment are designed to ensure that debate, not litigation, is vigorous, the subjective nature of the test of liability cannot create a bar to summary disposition of libel suits.<sup>1</sup> See McLee v. Chrysler Corp., 38 F.3d 67, 68 (2d Cir. 1994) (ruling that district court's view -- that summary judgment was unavailable in discrimination cases where employer's intent was at issue -- was unsupportable). Indeed, this Court finds little to distinguish silence enforced by oppressive litigation from "silence coerced by law -- the arguzant of force in its worst form." Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

In addition, the court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." New York Times Co., 376 U.S. at 270. As quoted in New York Times,

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<sup>1</sup> In this respect, the Court notes that both debate and litigation have been vigorous in the case at bar. CSI published an 80-page rebuttal to the Time article, which it distributed to church members, business leaders, and political figures. See Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Def.'s Memo.") at 3. In addition, CSI published a series of full-page advertisements in USA Today challenging the article and Time's accuracy and biases in publishing it. See id.; Affidavit of Lynn R. Farny ("Farny Aff.") § 16, Exs. 14, 15. The discovery in this case has been extensive, even though discovery has not yet been directed to the issue of truth or falsity. For example, Richard Behar, the author of the article, was deposed for 16 1/2 days over a 12 month period. See Def.'s Memo. at 4. The submissions to the Court in support of or in opposition to this motion consist of thousands of pages of memoranda, affidavits, and exhibits.



refined his focus -- gathering negative information from Scientology adversaries and proposing anti-Church articles -- while never changing any view about the Church, never accepting anything a Scientologist said and uniformly ignoring anything positive he learned about the Church.

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 2. As noted, malice in the sense of hatred or ill-will is often indicative of lack of the actual malice required under New York Times, and therefore would tend to undermine, not support, plaintiff's case. In addition, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant, 390 U.S. at 731. However, the combination of inadequate investigation with bias on the part of the publisher can give rise to an inference of actual malice. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 682 (1989). With a showing of an extreme departure from standard investigative techniques, bias of the reporter becomes relevant to explain this extreme departure as more than mere carelessness -- rather as purposeful avoidance of the truth. Plaintiff therefore devotes much of its opposition to the motion to attempting to demonstrate Behar's predetermined bias toward the church. However, plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof. Without a showing of inadequate investigation, bias merely confirms the publisher's firmly-held



belief in the allegedly defamatory statements.

With these principles in mind, the court considers each allegedly libelous statement individually to determine whether a rational finder of fact could find actual malice by clear and convincing evidence. See Tavoulareas v. Piro, 817 F.2d 762, 794 (D.C. Cir.) (en banc) ("[D]efamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice in conjunction with a false defamatory statement." (emphasis in original)), cert. denied, 484 U.S. 870 (1987).

#### A. Statements Set Forth at ¶ 40

Paragraph 40 of the complaint sets forth several statements alleged to be false and defamatory. (The text of the sentences as they appear in the article is set forth below; the portions quoted in the complaint are underlined.)

1. "In reality the church is a hugely profitable global racket that survives by intimidating members and critics in a Mafia-like manner."

2. "Says Cynthia Kisser, the [Cult Awareness] network's Chicago-based executive director: 'Scientology is quite likely the most ruthless, the most classically terroristic, the most litigious and the most lucrative cult the country has ever seen. No cult extracts more money from its members.'"

3. "Those who criticize the church -- journalists, doctors, lawyers and even judges -- often find themselves engulfed in litigation, stalked by private eyes, framed for fictional crimes, beaten up or threatened with death."

#### 1. Mafia-Like Intimidation



Time relied on many sources as the basis for its belief that "the church . . . survives by intimidating members and critics in a Mafia-like manner." None of these sources is so obviously incredible that a reasonable jury could infer from Time's reliance on their knowledge of falsity or subjective doubt as to veracity. See St. Amant, 390 U.S. at 732; cf. id. ("Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call."). Compare Harta-Hanks, 491 U.S. at 691 ("The hesitant, inaudible, and sometimes unresponsive and improbable tone of Thompson's answers to various leading questions raise obvious doubts about her veracity."). On the contrary, Behar relied on affidavits from former high-ranking Scientologists, newspaper and periodical articles, interviews and personal experience, and published court opinions, often issued after the benefit of adversarial presentation of testimony, which supported his professed belief that CSI intimidated critics and members. See Affidavit of Richard Behar ("Behar Aff.") ¶¶ 28-61. The Court finds that based on this evidence, no reasonable jury could find that CSI had proven by clear and convincing evidence that Time either knew or entertained serious doubts that the statement was false.

## 2. Most Ruthless, Classically Terroristic Cult

This statement appeared in the article in the form of a quotation from Cynthia Kisser, executive director of the cult



Awareness Network. "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports." Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). Based on the material supporting Behar's statement regarding Mafia-like intimidation, see Behar Aff. ¶¶ 28-61; see also id. ¶¶ 62-67, Behar's repetition of Kissar's statement was not done with knowledge that the statement was false or inherently improbable. Nor are there obvious reasons to doubt Kissar's veracity. There is no doubt that her views are deeply opposed to CSI's views, and each likely regards the other's conduct as reprehensible if not criminal, see Farny Aff. ¶ 98, but such sharp disagreement and Kissar's obvious antagonistic relationship with Scientology does not amount to an obvious reason to doubt her veracity. On the contrary, as executive director of an organization dedicated to studying so-called cults, her judgment as to CSI's ruthlessness and terroristic practices likely carried credence with Behar. See id. ¶ 62. The Court therefore finds that a reasonable jury could not find that plaintiff had demonstrated actual malice on the part of Time in publishing this statement by clear and convincing evidence.

3. Journalists, Doctors, Lawyers, and Judges Framed, Beaten Up, or Threatened With Death

In light of Behar's beliefs regarding his own experiences with Scientology, the admitted harassment of Paulette Cooper by



Scientology's Guardian's Office (which has been disbanded), and the other sources relied on by Behar, see Behar Aff. ¶¶ 85-93, the Court finds no evidence that Behar made the statement regarding journalists with actual malice. Similarly, there are not "obvious reasons to doubt" Behar's sources for his statement regarding doctors, lawyers, and judges. See St. Amant, 390 U.S. at 732. Although Behar does not have convincing evidence to link CSI with many of the strange incidents befalling these groups of people in conflict with Scientology, that fact alone does not allow a reasonable jury to conclude that Behar entertained doubts as to the veracity of his statement that these incidents are linked to CSI. Compare id. at 732 (good faith unlikely where story is fabricated by defendant, based on his imagination, or based on unverified anonymous telephone call). Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

B. Statements Set Forth at ¶ 58

CSI challenges the following as false and defamatory:

"THE LOTTICKS LOST THEIR SON, Noah, who jumped from a Manhattan hotel clutching \$171, virtually the only money he had not yet turned over to Scientology. His parents blame the church and would like to sue but are frightened by the organization's reputation for ruthlessness.

"His death inspired his father Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says.



'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.'

"It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

The primary sources relied on by Behar for these statements are the parents of Noah Lottick. The Lotticks affirmed the accuracy of each statement in the article. See Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment ("Def.'s Reply") at 12. Furthermore, the Lotticks are not obviously lacking in credibility, and the statements are not inherently improbable. Nevertheless, Behar made a thorough investigation of this aspect of his article by discussing it with various persons who knew Noah. Although Behar can be criticized for not interviewing Fred Lemons, an active Scientologist, asserted Scientology staff member, and former roommate of Noah Lottick, this omission is not such that it might raise an inference of purposeful avoidance of the truth.  Cf. Harte-Hanks, 491 U.S. at 682 ("[W]hile denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from [the uninterviewed] Stephens would quickly put an end to the story."). Any information to be gleaned from Lemons might be expected to be similar to, though less authoritative than, information that might be obtained from the director of the Scientology Dianetics Center, whom Behar twice attempted to contact.  See Behar Aff. ¶ 106. In short,



besides minor omissions in investigation, from which no inference of purposeful avoidance of the truth could reasonably be drawn, (even combined with Behar's alleged bias, see supra) CSI has not produced evidence such that a reasonable jury could find by clear and convincing evidence that Behar published the statements with actual malice. On the contrary, as reflected in Behar's notes from one of his conversations with the Lotticks, it appears that Noah had spent the money to which he had access, that Dr. Lottick had concluded that Scientology therapies were manipulations, and that no Scientology staff members attended the funeral.<sup>2</sup> See Affidavit of Jonathan W. Lubell, Esq., at Ex. 41. Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

C. Statements Set Forth at ¶ 43

Of the statements set forth at paragraph 45 of the complaint, pursuant to this Court's ruling of November 23, 1992, only the following remains at issue:

"Scientology denies any tie to the Fishman Scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide."

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<sup>2</sup> Although CSI asserts that Fred Lemons is a staff member, there is no evidence that Behar knew this fact. In addition, if Behar were trying to avoid this fact, he would not have contacted the Scientology center.



Behar relied on Steven Fishman, Uva Geertz, Fishman's psychologist, Marc Nurik, Fishman's former counsel, Vicki Aznaran, a former Scientologist, and Robert Dondero, the assistant United States Attorney who prosecuted Fishman for stock fraud. Although Fishman in many respects is not highly credible, based on the corroboration of aspects of his claims by other sources, this Court finds that his claims are not obviously incredible. Cf. St. Amant, 390 U.S. at 732 (good faith unlikely where unverified reliance on obviously incredible source). Specifically, Behar relied on Geertz's evaluation of Fishman's claims, Vicki Aznaran's corroboration of Fishman and Geertz's claims regarding the length of Fishman's involvement with the church, the depth of knowledge of Scientology that Fishman demonstrated, and the corroboration of certain claims by Robert Dondero. The fact that Dondero did not believe Fishman's claims does not undermine Behar's belief because Dondero was at the time prosecuting Fishman, and that prosecution would be undermined by accepting Fishman's account of Scientology's involvement with Fishman. Cf. Harte-Hanks, 491 U.S. at 682 (denials coming from interested witnesses would not cause reporter to question veracity of allegations). Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

D. Statements set forth in ¶ 52

of the statements set forth at paragraph 52 of the



complaint, pursuant to this Court's ruling of November 23, 1992,  
only the following remains at issue:

"One source of funds for the Lea  
Angeles-based church is the notorious, self-  
regulated stock exchange in Vancouver,  
British Columbia, often called the Asian  
capital of the world."

The Court finds that a reasonable jury could find by clear  
and convincing evidence that Time published the above statement  
with actual malice.

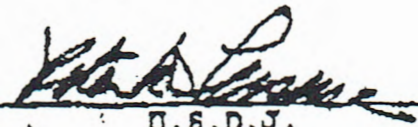


CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is HEREBY DENIED as to the statement set forth at paragraph 52 of the complaint, and HEREBY GRANTED as to all other statements.

SO ORDERED

New York, New York  
November 14, 1995

  
U.S.D.J.